Office Supreme Court, U S
FILED
NOV 29 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 626

G. MARK FRENCH and FRANCIS FRENCH,
Petitioners,

v.

TOWN OF CLINTWOOD, ex Rel. GOLDIE JOHNSON,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia

S. H. SUTHERLAND
Clintwood, Virginia
Attorney for Petitioners

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

SUBJECT INDEX

	Page
Reference to Reports of Opinions Below	1
Jurisdiction	1–2
The Questions Presented	2–3
Constitutional Provisions Involved	3
Statement of the Case	3–9
I. Procedural History of the Case	3–4
II. The Facts Material to the Questions Presented	4–7
III. The Stage at Which and Manner in Which Federal Questions Were Raised in Courts Below	8–9
ARGUMENT	10–17
I. Petitioners were denied due process of law by the holding that where an injunction has been issued to prevent violation of a statute, the subsequent repeal of the statute does not of itself dissolve the injunction; and if the repeal is thereafter found invalid, reliance upon the repeal prior to its invalidation constitutes a violation of the injunction amounting to a contempt	10–11
II. The imposition of a set-back line by a zoning ordinance, expressly said to be for the purpose of widening a public street, without a similar restriction on property on the opposite side of the street, is a taking of private property without just compensation and a discrimination violating the Equal Protection Clause	12–13
III. The appellate court's conclusions of fact on material aspects of the case were so much at variance with the real facts that petitioners were thereby deprived of due process of law	13–17
Proof of Service	18

Page

APPENDIX A—Opinion Below 19–28

APPENDIX B—Judgment Below 29–30

APPENDIX C—Order Denying Rehearing 31

Cases and Texts Cited

United States v. Dickinson, 331 U. S. 745, 91 L. Ed. 1789 13

58 Am. Jur., Zoning, sec. 51, p. 974 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

G. MARK FRENCH and FRANCIS FRENCH,
Petitioners,

v.

TOWN OF CLINTWOOD, ex Rel. GOLDIE JOHNSON,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia

---

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia entered in the above entitled case August 30, 1962.

OPINIONS BELOW

The official report of the opinion of the Supreme Court of Appeals of Virginia appears in 203 Va. 562; an unofficial report in 125 S. E. (2d) 798. No opinion was filed by the trial court.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was pronounced on June 11, 1962, and a petition

for rehearing was denied on August 30, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. A. 1257 (3).

Though the state appellate court remanded the case "for such further proceedings as may be necessary and proper under the circumstances", the decision became final upon the denial of the rehearing because nothing remains to be determined by the state court which could give rise to a federal question. The case was remanded for further proceedings in view of the destruction of the building in question by fire before decision of the state appellate court.

THE QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment was violated by holding that petitioners, one of whom had been enjoined under zoning ordinances from making repairs to a building, had violated the injunction by proceeding to repair the building after the enactment of a town ordinance removing all restrictions on the property, which they believed valid, though the ordinances was subsequently held to be invalid.

2. Whether the Due Process Clause of the Fourteenth Amendment was violated by a ruling that the petitioners, one of whom had been enjoined by a state court from repairing a building except in compliance with town ordinances, violated the injunction by making repairs to the building, after removal of the building restrictions by ordinance, without first petitioning the court for a dissolution of the injunction.

3. Whether petitioners were deprived of their property without Due Process of Law and whether their property was taken for public use without just compensation in violation of the Fifth Amendment, by the enactment of a town ordinance prohibiting an owner of property bordering on a public street from constructing buildings

nearer than a specified distance from the street line, where the ordinance stated expressly that the purpose of this provision was to "widen" a public street.

4. Whether the Equal Protection and Due Process Clauses of the Fourteenth Amendment were violated by a town ordinance prohibiting an owner of property bordering on one side of a public street from constructing buildings nearer than a specified distance from the street line, when no restriction was placed on property on the opposite side of the street.

5. Whether the conclusions of fact of the appellate court, e. g., that the petitioner, G. Mark French, had promised the trial court that the other petitioner, Francis French, would not proceed to repair the building in the interval between two hearings, in the face of the evidence that no such promise was made, was such a departure from judicial procedure as to amount to a violation of the Due Process Clause of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution:

> "No person shall . . . be deprived of . . . property without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment to the United States Constitution:

The Due Process and Equal Protection Clauses.

STATEMENT OF THE CASE

I. Procedural History of the Case.

In 1955 the petitioner G. Mark French, "his heirs and assigns", were enjoined by the Circuit Court of Dickenson

County, Virginia from making repairs to a building unless such repairs were made in conformity with town ordinances. On June 5, 1961, by town ordinance, all restrictions were removed from the property involved in this case and the property of one other owner. On June 6, 1961, Petitioner G. Mark French conveyed the property to a son, the petitioner Francis French, who began repairing the building. On July 12, 1961 the Circuit Court of Dickenson County held the amending ordinance invalid for failure to give proper notice of the proposed amendments and because made without definition of standards applicable to other property; and found that both petitioners had violated the original ordinances, the former decree of the court, and the rights of the respondent property owner, Goldie Johnson. The Supreme Court of Appeals of Virginia affirmed and remanded the case on June 11, 1962, and denied rehearing August 30, 1962.

II. The Facts Material to the Queestions Presented.

A 1955 injunction provided that petitioner, G. Mark French, "his heirs and assigns, be perpetually enjoined and restrained from reconstructing, rebuilding, altering or repairing said building involved in this case unless and until the same is done after compliance with the Zoning ordinances and Building and Fire Limits ordinances of said town" (Printed Record, p. 3). The zoning ordinance imposed a ten-foot set-back line upon the property in question, and the building ordinance required that repairs be of certain fireproof materials. The contemplated repairs would have violated the set-back line and would have involved use of combustible materials. On June 5, 1961 the two ordinances were modified by an ordinance which removed some of the restrictions from the French property and the property of one other owner; the set-back line was repealed and repair of the building was permitted by the use of specified non-combustible materials. The amendment reads as follows:

> "That the property adjoining McClure Avenue on the west side of said avenue belonging to G. Mark French and Silcox be removed from the Fire and Zoning Ordinance of the said town and the said G. Mark French and Silcox bind themselves not to construct buildings or repair buildings on said property except it has aluminum front and brick sides and otherwise comply with the building code of said town as to the construction of structures on said lots. The 10-foot set-back now required for building on said lots is specifically rescinded." (Transcript, Exhibit A).

On June 6, 1961 G. Mark French conveyed the property here involved to a son, the petitioner Francis French, who began repairing the building in compliance with the amended ordinances. The adjoining owner build a concrete party wall along the boundary between the French and Silcox property (Printed Record, p. 71). The front of the building was covered with sheets of aluminum; windows and plasterboard were installed; and brick and cinder blocks were delivered to the site in preparation for masonry work. The respondent Goldie Johnson, an adjoining property owner, instituted civil contempt proceedings against G. Mark French. At a hearing on June 20, 1961 it developed that the property had been conveyed to Francis French, and the hearing was continued to July 3rd so that he could be made a party. A hearing was held on that date, and on July 12, 1961 the Circuit Court declared the June 5th ordinance invalid because the Council had failed in adopting the amendment to prescribe any standards by which the application of the ordinances to other property should be governed (Printed Record, pp. 46-48). The court further found that both petitioners had violated the original ordinances, as well as the injunction, and the rights of the respondent, Goldie Johnson.

In affirming this decision, the appellate court declared the amended ordinance invalid because notice of the Council's public hearing to consider amendment of the

ordinances was indefinite and unauthorized, and because it provided no standards or guides by which the exemption of the property affected by the amendment was governed.

Article VII, Sec. 1 (c) of the Zoning Ordinance of the Town of Clintwood, adopted November 12, 1946, Transcript, Exhibit B, p. 7, imposes a ten-foot set-back line upon property on the west side of McClure Avenue, which includes the French property involved in this case. Sec. 2 of the Article VII expressly states that the purpose of imposing all set-back lines included in the Zoning Ordinance is for "reserving said strips for street widening at such time or times as the Town Council and the property owners or the Court may decide to widen said streets." The set-back line under consideration was imposed on property on one side only of McClure Avenue.

The appellate court's opinion states that at the conclusion of the hearing on June 20, 1961, "the court granted a continuance until July 5, upon an agreement with G. Mark French that he would not do any work on the building for himself or son in the meantime." 203 Va. at p. 564, 125 S. E. (2d) at p. 799. The only evidence on this point appears in the Printed Record, pp. 47-48:

> The Court: . . . I think I will enter an order continuing the proceeding until the 5th day of July here at the courthouse at 10:00 A.M., for whatever proceedings may be necessary.
>
> Mr. Phillips: We understand neither Mr. French nor his son will proceed.
>
> Mr. French: No, I don't know what the boy will do.
>
> The Court: It would be a futile thing to do, if after taking this proceeding against you he did, for I would issue the same papers probably. They would also have other remedy, that they could ask for a temporary injunction.

The following is quoted from the record of the hearing on July 5:

The Court: It was my understanding clearly that there would not be anything more done on the building. (Printed Record, p. 72).

* * * *

The Court: (Addressing G. Mark French) When the Court here on June 20th continued the matter until today and stated that it would be continued on the condition that there wouldn't be any more work, why didn't you see to it that there wasn't any more work done? Why didn't you give that information to your son or to the people you had employed instead of allowing them to continue? (Printed Record, p. 73).

* * * *

The Court: You didn't keep faith with the Court because your knew the Court was relying on your statement that there wouldn't be any more work done until the 5th until the Court decided the case.

G. Mark French: I think if you will remember the evidence it will say I promised for myself and not for my son. (Printed Record, p. 73).

* * * *

The Court: It seems to me if you were acting in good faith you would have naturally gone to your son and told him just what took place in court and that the matter was being held in abeyance according to an understanding with the Court until the 5th day of July.

G. Mark French: The Court asked me to promise that and I refused. I said I didn't have anything to do with my son and he could do that if he wanted to. (Printed Record, pp. 77-78).

The appellate court stated that the testimony of both petitioners "was vague, evasive, shifty and contradictory." 203 Va. at p. 566; 125 S. E. (2d) at p. 801. The appellate court also stated that petitioners "conspired" to avoid the effect of the 1955 injunction. 203 Va. at p. 562, 125 S. E. (2d) at p. 801. The trial court made no findings of fact.

III. The Stage at Which and Manner in Which Federal Questions Were Raised in Courts Below.

(A) *In the Trial Court.*

On June 20, 1961, G. Mark French filed a demurrer to the original complaint, asserting that any judgment against him under the complaint would take his property in violation of the Due Process Clause of the Fourteenth Amendment (Transcript, p. 7). Demurrer on the same ground was filed by petitioners on July 5, 1961, after Francis French had been made a party to the case (Transcript, p. 18). Petitioners excepted to the overruling of the demurrers (Printed Record, p. 12, p. 49).

By their Answer and Grounds of Defense filed on July 5, 1961, petitioners asserted that the original ordinances had been repealed as to the property in question, and that the petitioner Francis French was not bound by the 1955 injunction (Transcript, pp. 20-21).

At the introduction of testimony on June 20, 1961, the petitioner G. Mark French asserted that the zoning ordinance, by imposing a set-back line upon the property in question, took his property without due process of law and violated the equal protection clause because not imposed on property on both sides of the street (Printed Record, pp. 26, 27).

(B) *In the Appellate Court.*

By assignments of error, petitioners asserted that:

(1) A finding of contempt against petitioners deprived them of due process of law, since reliance on a presumptively valid statute was justified;

(2) The original ordinances had been repealed as to the property in question;

(3) The petitioner Francis French was not bound by the 1955 injunction decree; and

(4) Since the repairs made conformed to the requirements of the amended ordinance and were entirely of non-combustible materials, the punishment inflicted deprived the petitioners of their property without due process of law (Printed Record, p. 8).

By additional assignments of error, petitioners asserted that:

(1) The imposition of a ten-foot set-back line on the property here involved is invalid as to Francis French as a taking of private property for public use without just compensation (Printed Record, p. 9).

(2) The imposition of the set-back line on one side of the street only violated the Equal Protection Clause of the Fourteenth Amendment (Printed Record, p. 9).

By objection to respondent's motion to dismiss as moot after the destruction of the building by fire, petitioners reiterated their position that as to the petitioner Francis French the imposition of the set-back line was a taking of private property for public use without just compensation, and that the fact that it was imposed on property on one side of the street only violated the equal protection of the laws (Transcript, p.).

In their brief before the appellate court and their petition for rehearing, petitioners restated the foregoing positions at length.

ARGUMENT

I. Certiorari should be granted in this case because the effect of the decision of the Virginia appellate court is to hold that where a state court grants an injunction to prevent the violation of a statute, (1) the subsequent repeal of the statute does not affect the injunction until the person enjoined secures from the court a modification or dissolution of the injunction, and, (2) though the repeal be presumptively valid, if it is later found invalid, action taken by those subject to the injunction in reliance on the repeal is a violation of the injunction amounting to a contempt. Either result violates the Due Process Clause of the Fourteenth Amendment as to the petitioners.

It may be conceded that even an erroneous injunction must be obeyed until vacated, dissolved, or set aside or corrected in a manner provided by law, but that concession does not reach the situation presented by the facts of the present case. Where an injunction is issued to prevent the violation of a statute, the modification of the statute is a modification of the injunction in a manner provided by law. If this were not so, then the legislative action in modifying the statute would be a fruitless and unavailing, unless the court should also concur. The continuation of an injunction after the amendment of the ordinances would amount to a usurpation of legislative authority by the court. In the present case the rebuilding of the structure was only unlawful because so declared by the town ordinance, and could then be enjoined. After removal of the restrictions on this property by town ordinance, it became lawful to rebuild. A continuation of the injunction amounts to saying that a court lawfully may enjoin the doing of a lawful act. If, after repeal of the restrictions, the court is required as a matter of course to alter the injunction upon application, then the requirement that the person enjoined petition the court for a modification or dissolution becomes a mere formality, and

failure to so petition would not constitute a violation of the injunction or amount to a contempt.

Even if the ordinance removing the restrictions on the French property was invalid, petitioners were entitled to act in reliance upon its presumed validity until it was declared invalid. The power to amend a zoning ordinance is a legislative power, one clearly within the power of the town council. The amendment was not invalid on its face. Where the invalidity of a legislative act is even debatable, it will be sustained. The amendment was not clearly unreasonable, arbitrary or capricious, and was not shown to bear no reasonable or substantial relation to the public health, safety, morals, or general welfare. Accordingly, the honest belief of petitioners that the amendment had removed all restrictions on rebuilding is sufficient to negative contempt, unless after the amendment was found invalid they persisted in making repairs to the building.

It will be observed that the respondent Goldie Johnson, in her pleadings, did not claim that the amendment was invalid on its face. Her contention that the amendment was invalid was based on the position that the amendment enacted did not conform to the notice of the proposed amendment published in the newspaper. This seems a good indication that the repealing ordinance was not invalid on its face. The appellate court and the trial court did not agree on the reasons for finding the amendment invalid, giving further strength to the conclusion that the repeal was not invalid on its face.

It is submitted that even if the amending ordinance was correctly held to be invalid, petitioners were denied due process by the holding that their reliance on the amendment does not shield them from a finding of contempt. The holding of the lower courts was the same as if the amending ordinance had never been enacted. Until the amendment was adjudged invalid, it constituted a defense to the contempt charge.

II. As to petitioner Francis French, the provision of the original zoning ordinance imposing a ten-foot set-back line for the property in question for the purpose of widening the street, without a similar restriction on property on the opposite side of the street, is a taking of private property without just compensation and a discrimination violating the Equal Protection Clause of the Fourteenth Amendment.

Article VII, sec. 1 (c) of the Zoning Ordinance of the Town of Clintwood imposes a ten-foot set-back line upon property on the side of McClure where the French property is situated, but not upon property on the opposite side of the street, nor along the entire distance of the side on which the French property is located. Sec. 2 of Article VII expressly states that the purpose of imposing all set-back lines included in the Zoning Ordinance is for "reserving said strips for street widening at such time or times as the Town Council and the property owners or the Court may decide to widen said streets."

This provision is invalid on its face. A municipality may impose set-back lines upon property in the interest of the health, safety, and convenience of the public, and if done pursuant to such purposes, does not unconstitutionally deprive the owner of his property without due process of law. However, in the present case, the set-back line was not adopted pursuant to the police power; the ordinance states that the purpose for which all set-back lines are imposed is for "*reserving said strips for street* widening at such time or times as the Town Council and the property owners or the Court may decide to *widen* said streets." Even under the police power the town does not have the power to impose a set-back line for the purpose of widening the street. The town, by zoning, may restrict the use of property in private hands, but may not, by zoning, acquire it for public use, unless the owner is compensated for the taking. By stating that the purpose of this provision was to widen the street, the

council has negatived any possible construction of this provision as an enactment under the police power.

There can be no doubt that there has been a taking of property under the guise of zoning. The taker has not acquired possession, but it has imposed a servitude upon the property. The taker has said to the property owner that he may not use his property in a certain way, until such time as some one of several authorities, at some indeterminate future time, decides whether or not it will actually utilize the property. Meanwhile, the servitude exists. That this meets the test of a taking in this Court is shown by the following quotation:

> Property is "taken within the meaning of the Constitution when inroads are made upon the owner's use of it to an extent that, as between private parties, a servitude has been acquired either by an agreement or in the course of time." United States v. Dickinson, 331 U. S. 745, 748, 91 L. Ed. 1789, 1794 (1947).

The set-back line is discriminatory for two reasons. First, it normally is discriminatory to impose a set-back line on property on one side of a street, and not on that on the other. 58 AM. Jur., Zoning, sec. 51, p. 974. Second, the Frenches have been asked to bear the burden of contributing the property necessary for the widening of the street, when other property owners on that street have not been required to make any contribution. For these reasons, there has been a denial of the equal protection of the laws.

III. The appellate court arrived at conclusions of fact on material aspects of the case so much at variance with the real facts that petitioners were thereby deprived of due process of law.

The appellate court's opinion states that at the conclusion of the evidence on June 20, 1961, "the court granted a continuance until July 5, upon and agreement with G. Mark French that he would not do any work on the build-

ing for himself or son in the meantime." 203 Va. at p. 564, 125 S. E. (2d) at p. 799. The reasonable inference from this statement is that in return for G. Mark French's promise not to proceed with the repairs, both for himself and for his son, who was not then a party to the case, the court granted G. Mark French a continuance. That this is incorrect, and that G. Mark French made no such promise is clearly shown by the Printed Record pp. 47-48:

> The Court: . . . I think I will enter an order continuing the proceeding until the 5th day of July here at the courthouse at 10:00 A.M., for whatever proceedings may be necessary.
>
> Mr. Phillips: We understand neither Mr. French nor his son will proceed.
>
> Mr. French: No, I don't know what the boy will do.
>
> The Court: It would be a futile thing to do, if after taking this proceedings against you he did, for I would issue the same papers probably. They would also have other remedy, that they could ask for a temporary injunction.

The above passage from the record shows that the continuance was not applied for by either of the parties; the court of its own motion continued the case. G. Mark French agreed that he would not proceed further with the reconstruction of the building, which he had ceased as soon as the first order to show cause had been served upon him on June 17th. He frankly told the court that he could not guarantee or promise that his son would not proceed, but he did promise that he himself would not do so. The court then remarked, in substance, that if the son did proceed to repair the building, he would be engaging in a futile act, for the court would then issue an order requiring him to show cause why he should not be punished for contempt, and further, that the respondent, Goldie Johnson, could ask for an injunction. G. Mark French clearly notified the court that he was not able to

guarantee that the son would not continue the repairs, and the court's response showed that the court understood this to be the situation. At the second hearing, on July 5th, the court gave the impression that he had thought he had been promised that no repairs would be made by the son during the interval between the two hearings:

> The Court: It was my understanding clearly that there would not be anything more done on the building (Printed Record, p. 72).
>
> * * * *
>
> The Court: When the Court here on June 20th continued the matter until today and stated that it would be continued on the condition that there wouldn't be any more work, why didn't you see to it that there wasn't any more work done? Why didn't you give that information to your son or to the people you had employed instead of allowing them to continue? (Printed Record, p. 73).
>
> * * * *
>
> The Court: You didn't keep faith with the Court because you knew the Court was relying on your statement that there wouldn't be any more work done until the 5th until the Court decided the case.
>
> G. Mark French: I think if you will remember the evidence it will say I promised for myself and not for my son. (Printed Record, p. 73).
>
> * * * *
>
> The Court: It seems to me if you were acting in good faith you would have naturally gone to your son and told him just what took place in court and that the matter was being held in abeyance according to an understanding with the Court until the 5th day of July.
>
> G. Mark French: The Court asked me to promise that and I refused. I said I didn't have anything to do with my son and he could do that if he wanted to. (Printed Record, pp. 77-78).

The appellate court stated that G. Mark French admitted that he purchased some of the materials for the

building, and from the context of this statement, that this occurred after the first hearing and after the promise of G. Mark French not to proceed with the repair of the building. G. Mark French made no such statement; all the purchase of materials in which he participated occurred before June 17, 1961, the day he was served with process in the first proceeding.

The appellate court stated that petitioners "conspired" to violate the 1955 injunction. The fact that G. Mark French conveyed the property to Francis French on the day following the amendment of the ordinance was considered by the Court as part of the evidence sustaining the existence of a conspiracy. There is other pertinent evidence on this matter. The uncontradicted testimony of G. Mark French was that the conveyance was a gift pursuant to his plan to dispose of his property so as to minimize death taxes. Nor did petitioners become conspirators because G. Mark French urged the town council to remove the restrictions on the property. In addition, there was nothing clandestine or secret in his operations before the council; he published a notice in a newspaper for two weeks announcing his intention of requesting the council to remove the restrictions on his property.

The appellate court, therefore, mistakenly believed that petitioner G. Mark French had made and violated an express promise to the trial court not to permit the other petitioner to proceed to repair the building before the second hearing. The appellate court also incorrectly believed that petitioner G. Mark French purchased materials to repair the building after agreeing not to make further repairs. The appellate court also concluded that he conveyed the property to Francis French to avoid the effect of the injunction, when the undisputed evidence is that the conveyance had been agreed upon for some time, and was a part of a plan to dispose of property to minimize death taxes. Finally, the appellate court considered the

effort of one of the petitioners to persuade the council to remove the restrictions on his property as evidence of a conspiracy to evade the injunction. It is submitted that the appellate court decided the case on a state of facts substantially different from those actually in evidence, which was a violation of the Due Process Clause of the Fourteenth Amendment.

Therefore petitioners respectfully request that a writ of certiorari issue to the Supreme Court of Appeals of Virginia.

S. H. SUTHERLAND
Clintwood, Virginia
Attorney for Petitioners

S. H. SUTHERLAND
Of Counsel

PROOF OF SERVICE

I, ...,

.....

.....

depose and say that at the request of S. H. Sutherland, Clintwood, Virginia, attorney of record for C. Mark French and Francis French, petitioners herein, on the ..... day of November, 1962, I served a copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia on Mrs. Goldie Johnson, respondent herein, by depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to Messrs. Phillips & McFall, Clintwood, Virginia, counsel of record for said respondent.

.....

Subscribed and sworn to before me, at .....

.....

this ..... day of November, 1962.

.....

APPENDIX A

OPINION BELOW

RICHMOND

G. MARK FRENCH, ET AL. v. TOWN OF CLINTWOOD, EX REL. GOLDIE JOHNSON.

June 11, 1962.

Record No. 5416.

Present, All the Justices.

Appeal from a decree of the Circuit Court of Dickenson County. Hon. F. W. Smith, judge presiding.

Affirmed and remanded.

The opinion states the case.

Benjamin F. Sutherland, for the appellants.

Case submitted on brief for the appellee.

Glyn R. Phillips; L. Victor McFall (Phillips & McFall, on brief), for the appellee.

SPRATLEY, J., delivered the opinion.

This appeal brings under review a decree wherein G. Mark French and Francis French were adjudged to be guilty of civil contempt for the violation of an injunction granted by the trial court on September 15, 1955, in a former suit by the *Town of Clintwood* v. *G. Mark French*.

The facts and proceedings in the 1955 cause may be summarized as follows:

In 1946, the town of Clintwood adopted a zoning ordinance and a building and fire-limits ordinance. At that

time G. Mark French was the owner of a lot situated on the west side of McClure avenue in Clintwood, standing flush with the boundary line of the avenue. A two-story building was on the lot, a portion of which Mark French had occupied as an office for the practice of law for about thirty-five years. The area in which the lot was located was classified (in the zoning ordinance) as business property, and the ordinance provided that no building in that area should be thereafter erected on "a 10-foot strip on the west side of McClure avenue."

The building and fire-limits ordinance, hereinafter referred to as the building ordinance, required that new buildings on the west side of McClure avenue should be of fire proof materials, except that "the use of new materials or modes of construction," approved by recognized authorities, might be permitted by the town's Building Inspector; that no building or structure should thereafter be built, enlarged or altered without a permit issued by the Mayor, and approved by the Building Inspector; and that no non-conforming building should be altered, rebuilt or repaired, if the cost to do so was 50% of the value of the building reconstructed or restored.

On February 20 and 21, 1955, the French building was damaged by successive fires. Subsequently, G. Mark French began to repair the building, and the town of Clintwood filed a suit in equity, in the Circuit Court of Dickenson county, against him, alleging that the repairs were in violation of the zoning and building ordinances of the town, and praying that French be enjoined from completing the repairs.

French answered, denied the allegations of the bill, and charged that the said ordinances were discriminatory and unconstitutional.

On September 15, 1955, the court, after hearing the evidence, upheld the validity of the ordinances, and found

that the building of French was damaged more than 50% by the fires; and that French was undertaking to rebuild, repair and restore his building without first obtaining a building permit as provided by the building ordinance. It then decreed that "G. Mark French, his heirs and assigns, be perpetually enjoined and restrained from reconstructing, rebuilding, altering or repairing said building involved in this case, unless and until same is done after compliance with the zoning ordinance and building and fire-limits ordinance of said town, which the court finds the defendant has failed to do."

G. Mark French excepted to the action of the court and filed a petition for an appeal. We refused the appeal on January 17, 1956. On June 17, 1961, Goldie Johnson, a resident and taxpayer of Clintwood and the owner of property adjoining the French lot, instituted the present proceeding by filing a petition in the Circuit Court of Dickenson county against G. Mark French. She alleged that French was repairing his building without complying with the ordinances of Clintwood, and in violation of the decree of September 15, 1955, in the former case of *Town of Clintwood* v. *G. Mark French*. On the same day a rule was issued against French to show cause why he should not be adjudged in contempt of court in disobeying the said decree. French appeared and filed an answer. A hearing was had on the rule on June 20, 1961, and at the conclusion of the evidence the court granted a continuance until July 5, upon an agreement with G. Mark French that he would not do any work on the building for himself or son in the meantime.

On June 29, 1961, Goldie Johnson filed an amended petition and affidavit, setting out that G. Mark French and Francis French, on or about June 24, 1961, had begun to repair and reconstruct the building involved without complying with the ordinances of the town or the decree of September 15, 1955, and prayed for a rule against both

G. Mark French and his son. The rule was issued and both defendants filed a motion to quash, a demurrer and an answer. The motion to quash and the demurrer were overruled. The defendants in their joint answer denied that there was any valid zoning or building ordinance in the town of Clintwood; denied that they had done any act not in compliance with said ordinances; and alleged that after the entry of the September 15, 1955, decree the town of Clintwood had rescinded and repealed the zoning ordinance referred to in that decree.

On July 3, the cause came on to be heard, and by agreement of the parties, it was ordered by the court that this cause which had proceeded under the caption of *Goldie Johnson* v. *G. Mark French* should be restyled as *Town of Clintwood, Ex Rel. Goldie Johnson* v. *G. Mark French and Francis French.* The evidence was heard *oretenus*, and the issue was whether the defendants were guilty of civil contempt. Code, § 18.1-292 (5), 1960 Replacement Vol.

It appeared thatin the May 10, 1961, issue of "The Dickensonian," a newspaper published at Clintwood, there was a notice that the town of Clintwood would on June 5, 1961, consider whether the "Fire Ordinance and Zoning Ordinance of the Town of Clintwood be changed and modified in the following particulars, to-wit: That the property on the South side of McClure Avenue in Clintwood, Virginia, belonging to Icen Silcox and G. Mark French be omitted from the fire ordinance and zoning ordinance of the Town of Clintwood."

This notice was prepared by or at the direction of G. Mark French, and its publication in the newspaper obtained by him. The town clerk testified that she did not sign or attest the notice, nor authorize same to be done, although the newspaper publication bears her name thereon.

It will be observed that the proposal to amend the ordinance was with respect to property on the "south side of McClure Avenue," belonging to G. Mark French; whereas, his property, the property involved, was on the west side of that avenue; and that the notice made no mention of the 10-foot set-back requirement of the zoning ordinance.

On June 5th, the town council adopted a resolution to amend the ordinance of the town, under a conditional agreement with the persons named in the proposed amendment. The amendment reads as follows:

"That the property adjoining McClure Avenue on the west side of said avenue belonging to G. Mark French and Silcox be removed from the Fire and Zoning Ordinance of the said town and the said G. Mark French and Silcox bind themselves not to construct buildings or repair buildings on said property except it has aluminum front and brick sides and otherwise comply with the building code of said town as to the construction of structures on said lots. The 10-foot set-back now required for building on said lots is specifically rescinded."

On June 6th, G. Mark French conveyed the lot and building in question to his son, Francis French. G. Mark French said that the conveyance was a gift to his son "to comply with the gift statute" and to save estate taxation. Francis French, who holds a Bachelor's degree in Business Administration, resides in Salem, Virginia; but from time to time visited his father in Clintwood and kept in touch with him. The deed for the lot was not recorded in the local clerk's office.

Immediately after the conveyance of the lot to Francis French, work was begun on the repair and reconstruction of the building. G. Mark French continued to occupy a portion of it as a law office. He testified that he supervised the repair work thereon for his son, "up until

I found that there was a complaint and then I phoned the boy and quit supervising it because I didn't want to appear in any way to disregard an injunction anybody thought was correct. The phone call to Francis French was made on June 17, 1961, after a rule had been served on G. Mark French to show cause why he should not be punished for repairing his building in violation of the 1955 decree.

G. Mark French said he called his son after the hearing on June 20, 1961, and told him: "I told the Judge I wasn't going to work any more, that he would have to make other arrangements." Francis French immediately came to Clintwood, stayed all night in his father's home, and the repair work on the building was continued until June 30, 1961. G. Mark French admitted that he purchased some of the materials for the building, and that he arranged to obtain workmen for his son to continue its reconstruction. Francis French admitted that on June 21 or 22, 1961, he had heard of the injunction order of 1955. Nevertheless, he continued the work, knowing that his father had stopped on June 20, 1961. No building permit was obtained by the father or son.

The testimony of both G. Mark French and his son was vague, evasive, shifty and contradictory. Both said that they thought the June 5th action of the town council removed all restrictions on the lot. The record is replete with evidence that both father and son knew of the 1955 injunction decree, and that they, nevertheless, undertook and conspired to avoid its force and effect in the manner and under the excuse recited by them. The chancellor was patient, considerate and forbearing. He gave appellants full opportunity to purge themselves of contempt, and they failed to take advantage thereof.

In a decree entered on July 12, 1961, the chancellor found:

(1) That the ordinance of the town of Clintwood of June 5, 1961, which undertook to exempt the property of G. Mark French and one, Silcox, from the operation of the ordinances then in force in said town, and "to remove same from the operation and administration of said fire and zoning ordinances without any rule or regulation made applicable to other property on said McClure avenue within the said fire and zoning ordinances then in force, was illegal and without authority of law;"

(2) That G. Mark French and Francis French in proceeding to reconstruct and repair the said building, since the decree of September 15, 1955, had done so without complying with the ordinances of Clintwood in effect at the time, and in violation of the injunction of September 15, 1955; and

(3) That in repairing said building in the manner described in said decree, and in "erecting the foundation for the reconstruction of a part of said building in violation of the said ordinances and said decree," G. Mark French and Francis French had "violated the rights of Goldie Johnson, the laws of said town, and said injunction of this Court;" and that "the plaster board, windows and doors so placed by the defendant, or either of them, in and on said old building in an attempt to repair and rebuild the said building as aforesaid, should be removed."

The court thereupon adjudged, ordered and decreed that "G. Mark French and Francis French remove the said plaster board, windows and doors from said building within ten days from the date of this decree, and that in the event the said defendants fail to do so in compliance with this decree, that they be held in contempt of this Court and punished as the Court may hereinafter find necessary to enforce this decree. * * *."

The defendants duly excepted, and we awarded them an appeal on October 9, 1961.

[1] Defendants principally contend that the trial court erred in holding invalid the action of the town council on June 5, 1961. They claim that the evidence was insufficient to find either of them guilty of contempt because they honestly relied on the validity of the June 5th action; and further, they assert that the original ordinances are of a discriminatory nature, and provide for the taking of property without just compensation.

We find no merit in any of the appellants' assignments of error. The evidence amply supports the finding of facts by the chancellor and his rulings thereon.

In the 1955 case of *Town of Clintwood* v. *Mark French*, the court had jurisdiction of the parties and of the subject matter of the suit and the legal authority to make the decree of September 15, 1955. The refusal of the appellants to obey that decree made them liable to contempt. Even if it was erroneous, it was as binding on them as if it had been correct, until it was vacated, dissolved, or set aside or corrected in a manner provided by law. *Robertson* v. *Commonwealth*, 181 Va. 520, 537, 25 S. E. 2d 352, 146 A. L. R. 966; *Deeds* v. *Gilmer*, 162 Va. 157, 261, 262, 174 S. E. 37; 4 Michie's Jur., Contempt, § § 8 and 9, pages 251, 257.

The notice published in the newspaper that the town council would reconsider amending its ordinances was incorrect, insufficient and unauthorized. The council had not ordered it to be published, and it was not signed, or authorized to be signed, by the town clerk. It stated that the change to be made related to "the south side of McClure Avenue," when, in fact, the proposed ordinance was intended to exempt property on the "west side" of that avenue.

The ordinance of June 5th is arbitrary, ambiguous and indefinite. It sets out a conditional agreement to be entered into between Clintwood on the one part and G. Mark

French and Silcox on the other part. It provides no standards or guides by which the exemption was governed, nor assigns any reason therefor. Moreover, it required the beneficiaries named "to otherwise comply with the building code of the town." This as we have seen, appellants did not do.

The trial court, in the 1955 proceeding, upheld the zoning ordinance containing the 10-foot set-back requirement, and, consequently, the validity of that requirement is not in issue in this proceeding for contempt. While the courts disagree as to the validity of set-back requirements, we have adopted the view that a municipal ordinance, enacted in the interest of the health, safety and convenience of the public, prohibiting an owner of property bordering on a public street to construct buildings nearer than a specified distance from the street line does not unconstitutionally deprive such owner of his property without due process of law. *Gorieb* v. *Fox*, 145 Va. 554, 562, 134 S. E. 914, Aff. 274 U. S. 603, 71 L. ed. 1228, 47 S. Ct. 675, 53 A. L. R. 1210; and Cf. *West Bros. Brick Co.* v. *Alexandria*, 169 Va. 271, 192 S. E. 881, Appeal dismissed, 302 U. S. 658, 82 L. ed. 508, 58 S. Ct. 369.

It is well settled that a court in the protection and administration of justice is invested with power to punish for contempt in the disobedience of its orders and decrees, both by the inherent nature and constitution of a court, and by statute in Virginia. Code, § 18.1-292, 1960 Replacement Vol.

[2] The purpose of a civil contempt proceeding is to procure the imposition of a punishment, which will afford remedial relief to an injured party, and in appropriate cases to preserve and enforce the rights and administer the remedies to which the court has found the persons for whose protection an injunction was granted to be entitled, and to require the violator of an injunction to

restore the *status quo* as far as may be possible. The judgment complained of comes within these limitations. *Deeds* v. *Gilmer, supra,* 162 Va., at page 261.

[3] On January 22, 1962, appellee moved to dismiss the appeal granted in this case, on October 9, 1961, on the ground that all questions presented had become moot, since the building involved had been destroyed by fire on January 9, 1962, as shown by an affidavit thereto attached.

Appellants opposed dismissal, pointing out that while it might be impossible for them to comply with the final decree of July 12, 1961, under the circumstances now existing, the decree also adjudged them in contempt, and that decree was still in effect, as well as the holding of the court that the 1946 ordinances of Clintwood were valid and effective. Attached to their answer was an affidavit by G. Mark French that, "The foundation mentioned in the final decree herein was not destroyed by fire on the night of January 9, 1962."

The question whether appellants were guilty of contempt of court is not moot.

There is no evidence in the record before us as to the fire of January 9, 1962, or as to its effect; and this presents a matter for consideration by the trial court.

For the reasons stated, the decree appealed from will be affirmed and the cause remanded to the trial court for such further proceedings as may be necessary and proper under the circumstances.

Affirmed and remanded.

APPENDIX B

JUDGMENT BELOW.

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 11th day of June, 1962. G. Mark French and Francis French, Appellants, against Record No. 5416 Town of Clintwood, ex rel. Goldie Johnson, Appellee.

Upon an appeal from and supersedeas to a decree entered by the Circuit Court of Dickenson County on the 12th day of July, 1961.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the decree appealed from. It is therefore adjudged, ordered and decreed that the said decree be, and the same is hereby, affirmed; and in accordance with the views expressed in the said written opinion of this court, the cause is hereby remanded to the Circuit Court of Dickenson County for such further proceedings as may be necessary and proper under the circumstances. And it is further adjudged, ordered and decreed that the appellants pay to the appellee thirty dollars damages, and also its costs by it expended about its defense herein.

Which is ordered to be certified to the said circuit Court.

Appellee's costs:

Attorney's fee	$50.00
Printing brief	40.00
Total	$90.00

A Copy,

Teste; H. G. Turner
Clerk

Teste:

H. G. Turner, Clerk

The foregoing instrument is a correct copy of the order on file in this office.

[Seal]

FRENCHMAN O'QUINN, Clerk
of the Circuit Court of Dickenson County, Virginia

By /s/ J. C. STANLEY Dep. Clerk

APPENDIX C

ORDER DENYING REHEARING

VIRGINIA:

In the Supreme Court of Appeals held at the Masonic Building in the City of Staunton on Friday the 31st day of August, 1962. G. Mark French and Francis French, Appellants, against Town of Clintwood, ex rel. Goldie Johnson, Appellee. Upon a Petition to Rehear.

On mature consideration of the petition of the appellants to set aside the decree entered herein on the 11th day of June, 1962, and grant a rehearing thereof, the prayer of the said petition is denied.

A copy, Teste:
H. G. Turner
Clerk

The foregoing instrument is a correct copy of the order on file in this office.

FRENCHMAN O'QUINN, Clerk
of the Circuit Court of Dickenson County, Virginia.

By /s/ J. C. STANLEY
J. C. Stanley, Deputy

[Seal]